No. 17-9572

IN THE

Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Mississippi Supreme Court

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Johnson v. California*, 545 U.S. 162 (2005), and *Miller-El v. Dretke*, 545 U.S. 231 (2005).[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to serve on, and be tried by, an impartial jury constituted in a nondiscriminatory manner is as integral to full participation in our democracy as the right to vote. For precisely that reason, those who seek to deny full citizenship to African Americans have always sought to deny this right. Since *Strauder v. West Virginia* in 1880, this Court has been clear that discriminatory jury practices violate the Constitution. But the devil has been in the details. Since *Strauder*—and to this day—recalcitrant state and local officials have worked assiduously to evade this Court's mandates.

The racially motivated use of peremptory strikes is one discriminatory tactic that has been particularly difficult to root out. In *Batson v. Kentucky*, this Court recognized that its past efforts in the field had been inadequate and attempted to implement a more meaningful remedy. Thirty-two years later, the state of play is clear: without robust, searching judicial review of prosecutors' ostensibly neutral reasons for strikes, *Batson*'s promise will remain unkept.

The history of racial discrimination in Mississippi's Fifth Judicial District and Doug Evans' record of discriminatory conduct highlight both the depth of the problem and the need for searching judicial review of peremptory challenges. White residents of the Fifth Judicial District have employed various means since the Civil War to deny African Americans full citizenship: lynching, Jim Crow, mob violence, economic coercion, and the denial of voting and jury-service rights. Local officials have permitted this discrimination at best and directed it at worst.

Doug Evans' tenure as District Attorney is but the latest chapter in this history of discrimination. Mr. Evans has an unprecedented track record of discriminatory jury selection. Over the course of his twenty-five years in office, Mr. Evans has used peremptory challenges on African American jurors at 4.4 times the rate of white jurors. Mr. Evans has also taken multiple actions—prosecuting an African American juror who refused to vote for Mr. Flowers' conviction, lobbying local legislators to pass laws that would make it easier to avoid seating African American jurors in this case, and speaking on multiple occasions to a white supremacist group—that demand heightened scrutiny of his peremptory strikes in Mr. Flowers' case.

Mr. Evans' pattern of discrimination confirms what is clear from the transcript of Mr. Flowers' trial: the prosecution unconstitutionally discriminated against African Americans in jury selection.

ARGUMENT

I. THE RIGHTS TO SERVE ON—AND BE TRIED BY—AN IMPARTIAL, FAIRLY CONSTITUTED JURY, ARE INTEGRAL TO FULL AMERICAN CITIZENSHIP.

The right to trial by an impartial jury is "justly dear to the American people . . . and every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.). At a contentious Constitutional Convention, one of the few uncontroversial points was the importance of the right to trial by jury in criminal cases. *See, e.g.*, Federalist No. 83 (Hamilton). And the criminal-trial

jury receives three separate mentions in the Constitution's main text and the Bill of Rights. *See* U.S. Const. art. III. § 2; U.S. Const. amend. V; U.S. Const. amend. VI. Blackstone, "the most satisfactory exposito[r] of the common law of England," *Schick v. United States*, 195 U.S. 65, 69 (1904), saved his highest praise for the right. He considered the power to demand "the unanimous consent of twelve of his neighbours and equals" before any deprivation of liberty to be "the most transcendent privilege" and the "glory of the English law." 3 William Blackstone, *Commentaries on the Laws of England* 379 (Phila., J.B. Lippincott Co., 1893); *see also Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1880) (referencing Blackstone).

The Founders understood that a robust jury-trial right is indispensable to a government that claims to derive its "just powers from the consent of the governed." The Declaration of Independence para. 2. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary[.]" *Blakely v. Washington*, 542 U.S. 296, 306 (2004). At its best, this quintessentially democratic institution is a critical bulwark "against the arbitrary exercise of power[,]" *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), that "guards the rights of the parties" and "ensures continued acceptance of the laws by all of the people[.]" *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

Because the jury helps sustain our democracy, nondiscriminatory access to this institution is no less a part of full citizenship than suffrage. *See, e.g.*, *id.* at 407 ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most

significant opportunity to participate in the democratic process."). The jury does not just protect the defendant: it "preserves in the hands of the people that share which they ought to have in the administration of public justice." 3 Blackstone, *supra*, at 380. As De Tocqueville recognized, it "places the real direction of society in the hands of the governed" and "invests the people . . . with the direction of society."[2] That means illegitimate jury composition harms not just the accused, but "the "law as an institution," the "community at large," and "'the democratic ideal reflected in the processes of our courts.'" *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (citation omitted). Accordingly, this Court's cases recognize and protect the rights of "potential jurors" as much as defendants, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). Persons "excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 329 (1970).

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[2] Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vand. L. Rev. 1099, 1157 (2014) (quoting Alexis de Tocqueville, *Democracy in America* 293–94 (Philip Bradley ed., Vintage Books 1945) (1835)).

II. THROUGH DETERMINED EVASION, RECALCITRANT STATES HAVE SUBORDINATED THE RIGHTS TO SERVE ON AND BE TRIED BY FAIRLY CONSTITUTED JURIES TO ANTI-BLACK DISCRIMINATION.

African Americans have historically been excluded from the rights and privileges associated with full personhood in this country. The right to a jury trial—and to participate as a juror—is no exception. Of course, enslaved Black persons were deprived of the rights of citizenship. But even in the "free" Northern states, it appears that no African Americans served on a jury before two served in Massachusetts in 1860.[3] It took a Civil War and three Reconstruction Amendments to defeat the claim that African Americans could not be full citizens of this country. *See McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring).

Since the Civil Rights Act of 1875, it has been a crime to discriminate in the jury selection process. *See* Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37 (codified as amended at 18 U.S.C. § 243). And since 1880, it has been clear that the racial exclusion of jurors violates the Fourteenth Amendment. *See Batson*, 476 U.S. at 85 (citing *Strauder*). But in the 150 years since the Fourteenth Amendment's enactment, the battle against discrimination in the jury selection process has resembled nothing so much as Hercules' battle against the many-headed Hydra. Blackstone warned of "secret machinations" to erode

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[3] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884 (1994).

the right to trial by a jury "indifferently chosen[,]" 4 William Blackstone, *Commentaries on the Laws of England* 350 (Phila., J.B. Lippincott Co., 1893). But our history is replete with as many open machinations as secret ones.

A. Reconstruction's Collapse Engendered Immediate Denial of the Jury-Trial Right.

Even at the height of the federal government's attempt to protect the rights of the freedmen during Reconstruction, some jurisdictions managed to avoid seating African American jurors.[4] Initially, the judicial branch pushed back. In 1880, *Strauder* invalidated West Virginia's explicitly discriminatory state statute. *See* 103 U.S. at 305, 310, 312. And the next year, *Neal v. Delaware* vacated a conviction where—despite a facially neutral jury-selection statute—African Americans had been "uniform[ly] exclu[ded]" from jury service in the state. 103 U.S. 370, 389–90 394, 396–97 (1881). But the Court issued those decisions as Reconstruction ground to a halt, and the states of the former Confederacy seized the opportunity to devise new ways to suppress jury-service and jury-trial rights as they simultaneously suppressed the right to vote. *See, e.g., Batson*, 476 U.S. at 103 (Marshall, J, concurring).

Mississippi was an innovator in both realms.[5] Its concurrent attacks on jury and voting rights are evidenced in *Williams v. Mississippi*, 170 U.S. 213

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[4] *Id.* at 887.

[5] *See* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 Miss. L.J. 591, 602–07 (1987).

(1898), which concerned a challenge to a murder conviction obtained after indictment by an all-white jury. *See id.* at 213–14 (syllabus). The drafters of Mississippi's 1890 constitution wished "to obstruct the exercise of the franchise" by African Americans "within the field of permissible action" under the federal constitution. *Id.* at 222 (quoting *Ratcliff v. Beale*, 20 So. 865, 868 (Miss. 1896)). The drafters also wanted to prevent African Americans from serving on juries. They accomplished both goals by vesting discretion in registrars regarding eligibility to vote, pegging eligibility for jury service to that determination, and then providing by statute that selected jurors be of "good intelligence, sound judgment, and fair character. *Id.* at 217 n.1 (syllabus), 220–23. For both voting and jury-service rights, registrars exercised that discretion in a predictable, discriminatory way. Nevertheless, this Court failed to invalidate this suppressive tactic, reasoning that the law "reach[ed] weak and vicious white men as well as weak and vicious black men" and demanding difficult-to-obtain evidence regarding "how or by what means" the scheme actually worked in a discriminatory manner. *Id.* at 222–23. *Williams* unleashed a flood of copycats as states scrambled to employ similar means to disfranchise African Americans and deny them the right to serve on juries.[6]

The recalcitrant states desired all-white juries for the same reason they wanted an all-white electorate: "the perpetuation of white supremacy within the legal

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[6] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 77–78 (1990).

system depended substantially on the preservation of all-white juries."[7] Their goal was to "punish[] black defendants particularly harshly, while simultaneously refusing to punish violence by whites . . . against blacks and Republicans." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). They succeeded. During this period of largely unchecked race-based terrorism in the South, *see id.*, "all-white juries" repeatedly "acquitted or failed to indict whites suspected of killing blacks."[8] Conversely, for Black defendants, all-white juries reliably convicted on petty-crime charges, guaranteeing continued economic exploitation.[9] And, in cases where Black defendants escaped lynching, all-white juries in capital cases ensured that they met death with a patina of legality.[10] Without federal judicial, executive, or legislative support, jury-service and jury-trial rights were effectively eliminated for African Americans.

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[7] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 62 (2000); *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1595 (2018).

[8] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L. J. 895, 918, 931 (2004); *see also id.* at 931–33; Colbert, *supra* note 6, at 79 & n.396, 86–87; *cf. Peña-Rodriguez*, 137 S. Ct. at 867 (describing acquittal of all 500 white defendants charged with killing African Americans in Texas in 1865-1866).

[9] Forman, *supra* note 8, at 915–16; *see also* W.E.B. Du Bois, *Black Reconstruction in America* 167–180 (1962).

[10] *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. Rev. 1, 44 & nn.267–68 (1995); Colbert, *supra* note 6, at 79, 86–87.

B. The States Innovated to Elude This Court's Decisions Combatting Post-Reconstruction Jury-Service Suppression.

After several decades in which African American jury participation reached a nadir, this Court recalibrated its willingness to look behind facially neutral justifications for decreased participation. In *Norris v. Alabama*, the Court considered two counties in which no witness could recall African Americans ever serving on juries. 294 U.S. 587, 591–92, 596–99 (1935).[11] Looking past Alabama's "general assertions" that it simply could not find qualified jurors, the Court determined to "inquire not merely whether [a federal right] is denied in express terms but also whether it was denied in substance and effect." *Id.* at 590, 598. Applying that more rigorous review, it invalidated the challenged conviction. *See id.* at 596, 599. Similarly, *Hill v. Texas* vacated a conviction obtained pursuant to a facially neutral practice of grand-jury commissioners summoning persons "with whom they were acquainted and whom they knew to be qualified to serve," where the commissioners for

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[11] *Norris* was one of this Court's "Scottsboro cases," in which nine Black youths were accused of raping two white women on a northern Alabama train. *See* Michael J. Klarman, *Scottsboro*, 93 Marq. L. Rev. 379, 379 (2009). In "hastily arranged trials," with the specter of lynching looming, eight were given death sentences. *See id.* at 379–81. By the time this Court heard *Norris*, one of the accusers had recanted, *see id.* at 401, and today it is accepted that the youths were innocent, *see id.* at 52 n.13, 79; John Edmond Mays & Richard S. Jaffe, *History Corrected–the Scottsboro Boys Are Officially Innocent*, Champion (Mar. 2014), https://www.nacdl.org/Champion.aspx?id=32656.

years "consciously omitted to place" any Black person's name on the jury list. 316 U.S. 400, 401–02, 04 (1942).

These cases did not make new law so much as reinvigorate old law. *See, e.g., id.* at 405 (relying on the rule laid down in 1881's *Neal v. Delaware*). But, rather than comply with the Court's new willingness to enforce the rights of potential jurors, states modified their discriminatory practices yet again.[12] One Southern attorney's response to *Norris* in the New York Times is emblematic: "[t]here are enough legal loopholes and human ingenuities on hand to keep [African Americans] excluded . . . for a long time to come."[13] The Charleston News and Courier flatly declared in an editorial that *Norris* would be "evaded," as the Fourteenth Amendment was "'not binding upon [the] honor or morals of the South.'"[14]

Two main tactics were employed. First, some states interpreted the new cases as simply prohibiting the total exclusion of Black persons from jury pools, and thus worked to ensure that some—but as few as possible—Black persons entered the jury pool. For example, in *Akins v. Texas*, Dallas County's grand-jury commissioners conceded that their "intentions were to get just one [African American] on the grand jury[.]" 325 U.S. 398, 406 (1945). Indeed, after *Hill*,

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[12] Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511, 556 (1994).

[13] *Id.* at 564 n.265 (quoting *Alabama Seeks End of Scottsboro Case*, N.Y. Times, Nov. 17, 1935, at D7).

[14] Klarman, *supra* note 11, at 410 (quoting various News and Courier editorials) (alteration in original).

for 21 successive panels between 1942 and 1947, Dallas County's grand juries had no more than one and sometimes no African Americans. *See Cassell v. Texas*, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring).

Second, deviation from the policy of total exclusion raised the specter of African American jurors slipping on to petit juries.[15] To address that eventuality, states began to lean on the discriminatory peremptory strike.

Swain v. Alabama illustrates this tactical shift. In the 1950s and early 1960s in Alabama's Talladega County, African Americans were still underrepresented on venires, likely because of efforts like those employed in Dallas County to limit their presence in the jury pool. *See* 380 U.S. 202, 205–06, 208. While petit jury venires did have an average of six to seven African Americans per venire, no African Americans actually served as petit jurors, including on Swain's petit jury. *See id.* at 205–06. The Court rebuffed Swain's challenge to the peremptory strike, emphasizing that tactic's "old credentials," and refusing to hold that striking African Americans "in a particular case" could deny equal protection. *Id.* at 212, 221. *Swain* suggested, however, that systematic peremptory use to remove African Americans "in case after case, whatever the circumstances" might raise constitutional concerns. *Id.* at 223.

In practice, that suggestion proved inadequate to prevent the discriminatory use of peremptory challenges over the next twenty-one years. *See, e.g.*,

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[15] Colbert, *supra* note 6, at 85 & n.424.

Batson, 476 U.S. at 103–04 (Marshall, J., concurring). In fact, only two defendants satisfied *Swain* during this period.[16] Observing that *Swain* had imposed a "crippling burden of proof," *Batson* overruled it, holding that a single peremptory strike can be challenged as discriminatory and developing a burden-shifting framework to guide the inquiry into the question of discrimination. *Batson*, 476 U.S. at 93–98.

C. Jury Discrimination Remains Common After *Batson*.

Batson represented a significant step forward. But even as it was decided, Justice Marshall warned that it "w[ould] not end the illegitimate use of the peremptory challenge." *Id.* at 105 (Marshall, J., concurring). As he pointed out, it is easy to "assert facially neutral reasons for striking a juror," and if mere facial neutrality suffices to discharge the prosecution's burden, *Batson*'s "protection . . . may be illusory." *Id.* at 106; *see also Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*."). For this reason, sometimes courts must "look[] beyond the case at hand" to "all relevant circumstances" to resolve a *Batson* issue. *Miller-El*, 545 U.S. at 240.

Legal scholars and members of this Court have catalogued reams of evidence that "the discriminatory use of peremptory challenges remains a problem." *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring); *see*

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[16] Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 U.C.L.A. L. Rev. 517, 530 n.63 (1992).

id. at 267–69 (collecting studies and evidence regarding persistence of discriminatory peremptory strikes). An article published this year reviewed seven published empirical studies that evaluated *Batson*, all of which "concur in the basic finding . . . that prosecutors disproportionately use peremptory strikes to exclude black jurors."[17]

To note just a subset of the evidence:

- A 2010 report by the nonprofit Equal Justice Initiative detailed the prevalence of the discriminatory peremptory, including common disingenuous "neutral" reasons for strikes and the lack of lasting consequences for prosecutors found to have violated *Batson*.[18] Mississippi's prosecutors have been repeated culprits.[19]
- A 2012 study examining peremptory strikes in capital trials of all defendants on North Carolina's death row as of July 1, 2010, found that "prosecutors struck eligible black venire members at about 2.5 times the rate" they struck non-Black eligible venire members.[20]

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[17] Frampton, *supra* note 7, at 1624 & n. 178 (collecting studies and other resources containing empirical findings on *Batson*)

[18] *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 16–18, 21, 24, 28 (Aug. 2010) (hereinafter "EJI Report"), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf.

[19] *See, e.g.*, *id.* at 20, 23–24, 28, 29 (Montgomery County).

[20] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533 (2012).

- A 2017 study covering South Carolina capital cases between 1997–2012 found disproportionate strikes of Black potential jurors—"35% of black strike-eligible venire members" were excluded, compared to "12% of white strike-eligible venire members[.]"[21]
- A 2018 study, which covered 1306 North Carolina felony trials in 2011, found that prosecutors exercised peremptory strikes against Black jurors "at more than twice the rate that they excluded white jurors[.]"[22]
- Between 2011 and 2017, investigative journalists in Louisiana compiled a dataset pegged to over 5000 criminal trials in that state.[23] Their data shows that "prosecutors disproportionately strike black jurors no matter who they are prosecuting," and strike Black jurors more frequently when a Black person is the defendant.[24]
- A 2015 study using data collected from over 300 felony trials between 2003 and 2012 in Louisiana's Caddo Parish found that prosecutors struck Black jurors "at three

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[21] Ann M. Eisenberg et. al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. Rev. 373, 380 (2017).

[22] Ronald F. Wright et. al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1419, 1422, 1426 (2018).

[23] *See* Frampton, *supra* note 7, at 1620–21 (describing data set and study methodology).

[24] *Id.* at 1628.

> times the rate of [non-Black jurors]."[25] A study of 390 felony trials in Louisiana's Jefferson Parish between 1994 and 2002 also found that prosecutors struck Black prospective jurors at three times the rate they struck non-Black prospective jurors.[26]

These stark facts are now predictable. Just as "reliance solely on the good faith of prosecutors [was] misguided in light of the history of peremptory challenges in the period between *Swain* and *Batson*[,]"[27] it remains misguided in light of the history of strikes since *Batson*. If *Batson* is to have any meaning, the Court must continue to adhere to its promise in *Norris* to examine "not merely whether [rights were] denied in express terms but also whether [they were] denied in substance and effect." 294 U.S. at 590. An examination of all relevant facts shows that they were denied in Curtis Flowers' sixth trial.

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[25] Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* 2 (Aug. 2015), https://perma.cc/EE7P-HUXJ.

[26] *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 387 & nn. 146–147 (2012) (citing Richard Bourke, Joe Hingston & Joel Devine, La. Crisis Assistance Ctr., *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* (2003)).

[27] Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187, 199 (1989).

III. WINONA AND THE FIFTH JUDICIAL DISTRICT HAVE A LONG HISTORY OF DENYING AFRICAN AMERICANS EQUAL RIGHTS.

As in any case concerning purposeful discrimination, the context matters. *See Batson*, 476 U.S. at 93 (requiring "'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Here, that context is comprised in significant part by the history of racial discrimination in Winona and the Fifth Judicial District.

White residents of Winona and the Fifth Judicial District have long endeavored to deny African Americans full citizenship. These efforts—often led or facilitated by local officials—ranged from brutal violence and economic coercion to abuse of government power.

In 1937, a particularly heinous lynching in Winona spurred the United States House of Representatives to pass a rare anti-lynching bill.[28] After police arrested two African American men for the murder of a white man, a mob seized the men from the Winona courthouse and blow-torched them to death before a crowd of 300–400 men, women, and children.[29] According to an NAACP investigator, the

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[28] *The Congress: Black's White*, Time (Jan. 24, 1938), http://content.time.com/time/subscriber/article/0,33009,758933-2,00.html.

[29] Howard Kester, *Lynching by Blow Torch* 2-4 (Apr. 13, 1937), https://finding-aids.lib.unc.edu/03834/#folder_217#1.

sheriff and district attorney made no effort to identify or prosecute the murderers even though the abduction occurred in front of the district attorney and Mississippi's Secretary of State, and "[t]here are a thousand people in Montgomery County who can name the lynchers."[30] Based on his interviews, he observed that "[t]he citizens . . . seem[ed] rather well pleased with themselves."[31]

In 1955, 14-year-old Emmett Till met a similar fate. Following a train ride from Chicago, Mr. Till disembarked at the Winona station and traveled 30 miles east to his cousin's house.[32] While visiting his relatives, Mr. Till entered a local grocery store, and may have whistled at or near a white woman who worked there.[33] The woman took offense, and a few days later, her husband and friends kidnapped Mr. Till from his great uncle's home.[34] They proceeded to pistol-whip and shoot him before tying his neck to a gin fan with barbed wire and dumping him into the Tallahatchie River.[35] Two of the perpetrators were

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[30] *Id.* at 4, 7.

[31] *Id.* at 8.

[32] Jackson House, *This Boy's Dreadful Tragedy: Emmett Till as the Inspiration for the Civil Rights Movement*, 3 Tenor of Our Times, art. 4, 14-15 (2014).

[33] FBI, *Prosecutive Report of Investigation Concerning Roy Bryant, et al.* 6 (Feb. 9, 2006), https://static1.squarespace.com/static/55bbe8c4e4b07309dc53b00f/t/55c03e28e4b06f6d00a58d13/1438662184287/Emmett+Till+FBI+Transcript.pdf (hereinafter "FBI Report").

[34] *See id.*

[35] *See* House, *supra* note 32, at 17; Parker Yesko, *Acquitting Emmett Till's Killers*, Am. Pub. Media (June 5, 2018) (hereinafter "APM"),

charged with the murder and tried before an all-white jury.[36] Before jury deliberations occurred, "[e]very juror [was] visited by members of the [White Citizens'] Council to make sure they . . . voted 'the right way.'"[37] The jurors heeded the message and acquitted the defendants in an hour and five minutes.[38] "'If we hadn't stopped to drink pop,' one juror said in an interview, 'it wouldn't have took that long.'"[39]

The role of the White Citizens' Council in the Till trial represented one small part of its pro-segregation activities. From its inception in 1954 until the 1970's, the Council spearheaded white resistance to integration in Mississippi and much of the South. Dubbed the "uptown Klan" by Thurgood Marshall,[40] the Citizens Council was founded in Indianola, Mississippi just weeks after the Supreme Court decided *Brown v. Board of Education*.[41] Three months later, the group formed a state of association of councils headquartered in Winona.[42] The group's

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https://www.apmreports.org/story/2018/06/05/all-white-jury-acquitting-emmett-till-killers..

[36] *See* House, *supra* note 32, at 23 (citation omitted).

[37] FBI Report at 17 (citation omitted).

[38] *See* Yesko, *supra* note 35.

[39] *Id.*

[40] Southern Poverty Law Ctr., *Council of Conservative Citizens*, https://www.splcenter.org/fighting-hate/extremist-files/group/council-conservative-citizens (last visited Dec. 19, 2018).

[41] Jared A. Goldstein, *The Klan's Constitution*, 9 Ala. C.R. & C.L.L. Rev. 285, 344–45 (2018).

[42] *Citizen's Council/Civil Rights Collection 1954-1977, 1987-1992*, Univ. of S. Miss. – McCain Library & Archives,

founder, Robert Patterson, explained his reason for founding the Council as such: "Integration represents darkness . . . totalitarianism . . . and destruction. Segregation represents . . . the survival of the white race. These two ideologies are now engaged in mortal conflict and only one can survive."[43]

Funded by the State of Mississippi itself,[44] the Citizens' Council was largely composed of the white power structure: "bankers, merchants, judges, newspaper editors and politicians."[45] Indeed, its "titular spokesman" was Senator James Eastland,[46] and "the philosopher" of the group was Mississippi Supreme Court Justice Thomas Pickens Brady.[47] "Sanctioned by Mississippi's political elites, the state's White Citizens' Councils embarked on an oft-violent campaign to suppress civil rights agitation and to quell African American political participation. As one white Mississippian proclaimed: 'There's open

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http://lib.usm.edu/spcol/collections/manuscripts/finding_aids/m099.html (last visited Dec. 19, 2018).

[43] Thomas B. Edsall, *With "Resegregation," Old Divisions Take New Form*, Wash. Post (Mar. 9, 1999), https://www.washingtonpost.com/archive/politics/1999/04/09/with-resegregation-old-divisions-take-new-form/2bff9044-b356-4115-b11f-a9a156d1ec5c/?utm_term=.f8f7650031b2.

[44] *Citizen's Council / Civil Rights Collection*, *supra* note 42.

[45] Southern Poverty Law Ctr., *supra* note 40.

[46] Ruth Bloch Rubin & Gregory Elinson, *Anatomy of Judicial Backlash: Southern Leaders, Massive Resistance, and the Supreme Court, 1954-1958*, 43 Law & Soc. Inquiry 944, 964–65 (2018).

[47] Emily Prifogle, *Law and Local Activism: Uncovering the Civil Rights History of Chambers v. Mississippi*, 101 Cal. L. Rev. 445, 508 (2013).

season on the negroes now.'"[48] The group's presence was particularly strong in Winona. As a local election commissioner there explained, "You have to remember till about 1978, you couldn't get elected if you wanted to run for state representative unless you were approved by the White Citizens' Council."[49]

The Council did not act alone. The Winona Police also acted as violent, armed enforcers of segregation. In August 1960, an African American college student attempted to ride in the front of a bus from Atlanta to Jackson, Mississippi.[50] When the bus stopped in Winona, the sheriff and his deputy were waiting for the student.[51] They beat him with a blackjack and their fists and were joined by a group of white civilians.[52] After the beating, the officers arrested the victim on a charge of disturbing the peace.

The following year, the Winona police beat another African American man in the basement of the City Hall.[53] When the man's white, pro-segregation employer spoke to the police on his behalf, the police

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[48] Rubin & Elinson, *supra* note 46, at 964–65.

[49] Parker Yesko, *Letter from Winona: A year at the crossroads of Mississippi*," APM (May 1, 2018), https://www.apmreports.org/story/2018/05/01/winona-a-town-at-the-crossroads.

[50] John Herbers, *City Negro Beaten Up, Panel Told*, Delta Democrat-Times (Sept. 26, 1961), https://www.newspapers.com/image/21581794.

[51] *Id.*

[52] *Id.*

[53] Tom Scarbrough, Miss. State Sovereignty Comm'n, *Winona—Montgomery County*, Miss. Dep't of Archives & History (Feb. 23, 1962), https://bit.ly/2STDGYG.

beat the man a second time.[54] His employer then broached the matter with the FBI because "he wanted . . . to stop the whipping of his Negroes for apparently no reason at all."[55]

In June of 1963, the Winona police garnered national attention for their violent opposition to civil rights for African Americans. The police arrested Fannie Lou Hamer, a field secretary for the Student Nonviolent Coordinating Committee (hereinafter "SNCC"), and several of her colleagues after their bus stopped in Winona. A few bus riders had attempted to use the bathroom in a nearby restaurant, prompting the chief of police to expel Ms. Hamer's colleagues and arrest the entire group.[56] Ms. Hamer was taken to the county jail, where a state highway patrolman informed her, "[w]e are going to make you wish you was dead."[57] The officer then ordered two inmates to beat her with a blackjack until they stopped from exhaustion.[58] Ms. Hamer was left with permanent damage to her kidney and a blood clot in the artery of her left eye.[59] One of Ms. Hamer's out-of-town colleagues from SNCC called the Winona police station to ask how he could secure bail for the group

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[54] *See id.*

[55] *See id.* at 5.

[56] Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention, Atlantic City, New Jersey, APM: Say It Plain Series (Aug. 22, 1964), http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html.

[57] *Id.*

[58] *Id.*

[59] Janice Hamlet, *Fannie Lou Hamer: The Unquenchable Spirit of the Civil Rights Movement*, 26 J. of Black Studies 560, 565 (1996).

and was told to come to the station in person.[60] Upon his arrival, he was arrested for "disturbing the peace" and then subjected to a four-hour beating by the local police, the sheriff, and the mayor of Winona.[61] The police then charged him with the murder of two men whom he did not know.[62]

The next year, Ms. Hamer spoke at the Democratic National Convention, using her experience at the hands of the Winona police to emphasize the importance of voting rights;[63] however, national attention failed to stop the Winona police or quell the anti-Black violence. In 1965, the Sheriff asked a landlord to evict local civil rights workers from their house.[64] When the owner failed to do so, four men fired shots into the house.[65]

The following year, a different city in the Fifth Judicial District captured national attention for its anti-Black violence: Grenada, where Doug Evans' office is located and where Mr. Evans was then a

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[60] Stavis, *supra* note 5, at 652 n.263.

[61] *Id.*

[62] *Id.* at 653 n.263.

[63] Nicholas Targ, *Human Rights Hero Fannie Lou Hamer (1917-1977)*, Hum. Rts., Spring 2005, at 25-6. At the time, only 6.7% of nonwhite Mississippians were registered to vote—a number that was orders of magnitude lower than any other Southern state. *U.S. Comm'n on Civil Rights, Political Participation* 222 (1968).

[64] *Incident Summary – Mississippi, Student Nonviolent Coordinating Committee*, Lucile Montgomery Papers, 1963-1967; Freedom Summer Digital Collection, Univ. of Wis. (Jan. 1965), http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/35295.

[65] *See id.*

senior in high school. At the time, Grenada was known as a "segregation stronghold," and only 3% of African American residents were registered to vote.[66] After James Meredith's March Against Fear passed through town in June of 1966, African American residents of Grenada spent the summer marching peacefully for their rights while white residents assaulted them. The police stood by or used their powers to arrest and harass African American protesters.[67] The New York Times described one representative march as follows: "Civil rights demonstrators were pelted with bricks, bottles and firecrackers tonight while state and local law-enforcement officials stood by, laughing and chuckling."[68]

White segregationists ratcheted up their violent defense of Jim Crow later that summer after a federal court ordered Grenada to integrate its public schools. On the first day of school, white mobs led by the KKK surrounded the elementary and high schools while pick-up trucks equipped with two-way radios scoured the streets for African-American schoolchildren who could be targeted.[69] The mob beat the children with various weapons, and initially barred more than half of African American children from reaching the

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[66] Bruce Hartford, *Grenada Mississippi—Chronology of a Movement* (1967), https://www.crmvet.org/info/grenada.htm.

[67] *See generally id.*

[68] Gene Roberts, *White Mob Routs Grenada Negroes*, N.Y. Times (Aug. 10, 1966), https://timesmachine.nytimes.com/timesmachine/1966/08/10/issue.html?action=click&contentCollection=Archives&module=ArticleEndCTA&region=ArchiveBody&pgtype=article.

[69] *See* Hartford, *supra* note 66.

school.[70] When the school day ended, "[a] throng of angry whites wielding ax handles, pipes and chains" greeted the departing students and beat them further.[71]

White Grenada residents failed to halt integration, but violent harassment continued. As detailed in a 1966 letter from LDF attorneys to the parents of African American students in Grenada schools, "your children . . . have been subject to all sorts of violence, intimidation, and abuse," including white students who "bring knives, brass knuckles, and other weapons to school," and teachers who "call[] them 'niggers,'" and "explicitly urge[] the white students to inflict physical harm on the Negro students."[72]

The Grenada city government—including the police department where Doug Evans worked as an officer in the 1970s—also brazenly defied federal civil rights laws.[73] In 1977, the Northern District of Mississippi enjoined the city from continuing its racially discriminatory hiring, training, and promotion practices. The city's response did not honor

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[70] *See id.*

[71] AP, *Grenada Negroes Beaten at School*, N.Y. Times (Sept. 13, 1966), https://timesmachine.nytimes.com/timesmachine/1966/09/13/79311321.html?action=click&contentCollection=Archives&module=ArticleEndCTA&region=ArchiveBody&pgtype=article&pageNumber=1.

[72] Letter from Paul Brest, Miriam Wright, and Iris Brest to parents (Dec. 20, 1966), https://www.crmvet.org/docs/6612_grenada_parents-letter.pdf.

[73] *Neely v. City of Grenada*, 438 F. Supp. 390, 408 (N.D. Miss. 1977).

the spirit of the injunction. Grenada hired more African American police officers, but the police department forbade them from arresting white residents.[74] If an African American officer pulled over a white driver for violating the law, he was required to call a white officer to address the situation.[75]

Overt discrimination reminiscent of the Jim Crow era persists in Mississippi's Fifth Judicial District today. As de jure segregation ended, membership in the White Citizens' Council waned. Then, in 1985, Gregory Baum, an ex-field director from the Citizens' Council formed a new organization from the membership lists of the old organization: the Council of Conservative Citizens (hereinafter "CCC"). The CCC shared its white supremacist DNA with the old Citizens' Councils, but it shifted its focus to the dangers of "race-mixing"—an act of "rebelliousness against God,"[76] per the group's website—and "black-on-white crime," which has been a particular fascination of the CCC.[77] In the view of Baum, whose organization has called African Americans a "retrograde species of humanity,"[78] "[i]t's almost an open war on whites."[79]

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[74] *In the Dark Season Two, Episode 8: The D.A.*, APM Reports (June 12, 2018).

[75] *See id.*

[76] Southern Poverty Law Ctr., *supra* note 40.

[77] Donna Ladd, *From Terrorists to Politicians, the Council of Conservative Citizens Has a Wide Reach*, Jackson Free Press (June 22, 2015), http://www.jacksonfreepress.com/news/2015/jun/22/terrorists-politicians-council-conservative-citize/.

[78] Southern Poverty Law Ctr., *supra* note 40.

[79] *See* Ladd, *supra* note 77.

Like its predecessor the Citizens' Council, the CCC has attracted considerable support from Winona-area politicians. In 1991, Doug Evans—who has been described as a "racist white supremacist" by the former mayor of his hometown[80]—delivered the keynote address at a CCC meeting in Webster County.[81] The following year, he attended a CCC speech on "the historical background of the 'civil rights movement'" given by Robert Patterson, the founder of the White Citizens Council, and also spoke at the event.[82] In addition, Mr. Evans campaigned that year at the CCC-sponsored Black Hawk Political Rally. The rally benefited the Black Hawk Bus Association, which transported white children to a segregation academy that had been created in response to the integration of the local schools.[83]

Other politicians representing the Fifth Judicial District have also spoken at CCC events. At a minimum, former state representatives Dannie Reed and Bobby Howell, current state representative Jim Beckett, former Mississippi Supreme Court Justice Kay Cobb (who sat on *Flowers v. Mississippi*, 947 So.

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[80] Paul Alexander, *For Curtis Flowers, Mississippi Is Still Burning*, Rolling Stone (Aug. 7, 2013), https://www.rollingstone.com/politics/politics-news/for-curtis-flowers-mississippi-is-still-burning-188496/.

[81] *See id.*

[82] *See id.*; *see also* Alan Bean, *Doug Evans and the Mississippi Mainstream*, Friends of Justice (Oct. 20, 2009), https://friendsofjustice.blog/2009/10/20/doug-evans-and-the-mississippi-mainstream/.

[83] Parker Yesko, *The rise and reign of Doug Evans*, APM (June 26, 2018), http://explorerproducer.lunchbox.pbs.org/blogs/pmp/the-rise-and-reign-of-doug-evans/.

2d 910 (Miss. 2007)), and current state senators Gary Jackson and Lydia Chassaniol have all spoken at CCC events.[84] In 2009, Chassaniol, who is a CCC member, "gave a rabble-rousing speech on 'Cultural Heritage in Mississippi'" to the group's national convention.[85]

In 2012, the CCC came to the attention of Dylann Roof. Following George Zimmerman's trial for the killing of Trayvon Martin, Roof googled "black on White crime."[86] The first website he found was the Council of Concerned Citizens, and, in his words, "I have never been the same since that day."[87] "There were pages and pages of these brutal black on White murders. . . . At this moment I realized that something was very wrong."[88] Roof proceeded to murder nine African American congregants while they prayed in church three years later.[89] The CCC condemned Roof's violence but not his views. Its president, Earl Holt III, issued a statement that noted:

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[84] Southern Poverty Law Ctr., *Dozens of Politicians Attend Council of Conservative Citizens Events, Intelligence Report* (Oct. 14, 2004), https://www.splcenter.org/fighting-hate/intelligence-report/2004/dozens-politicians-attend-council-conservative-citizens-events; Southern Poverty Law Ctr., *supra* note 40.

[85] *See id.*

[86] *Dylann Roof's Manifesto*, N.Y. Times (Dec. 13, 2016), https://www.nytimes.com/interactive/2016/12/13/universal/document-Dylann-Roof-manifesto.html.

[87] *Id.*

[88] *Id.*

[89] Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. Times (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html.

> It has been brought to the attention of the Council of Conservative Citizens that Dylann Roof—the alleged perpetrator of mass murder in Charleston this week—credits the CofCC website for his knowledge of black-on-white violent crime. This is not surprising: The CofCC is one of perhaps three websites in the world that accurately and honestly report black-on-white violent crime, and in particular, the seemingly endless incidents involving black-on-white murder.[90]

Rampant affiliation with the CCC is not the only sign that Winona's politicians have failed to move beyond the area's troubled history. Last year, Bobby Howell's replacement as state representative, Karl Oliver, took to Facebook after learning that Louisiana intended to remove some Confederate statues.[91] Oliver, who also represents the town where Emmett Till was lynched, responded: "If the . . . 'leadership' of Louisiana wishes to, in a Nazi-ish fashion . . . destroy historical monuments of OUR HISTORY, they should be LYNCHED!"[92]

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[90] Ladd, *supra* note 77.

[91] Arielle Dreher, *State Rep. Karl Oliver Calls for Lynching over Statues, Later Apologizes*, Jackson Free Press (May 21, 2017), http://www.jacksonfreepress.com/news/2017/may/21/report-mississippi-rep-karl-oliver-calls-lynching-/.

[92] *Id.*

IV. DOUG EVANS HAS A HISTORY OF DISCRIMINATING AGAINST AFRICAN AMERICAN JURORS, AND THAT PATTERN OF DISCRIMINATION HAS PERSISTED THROUGHOUT MR. FLOWERS' TRIALS.

A. Mr. Evans' Office Strikes African American Jurors at a Much Higher Rate Than White Jurors.

A detailed statistical analysis conducted by American Public Media Reports (hereinafter "APM Reports") demonstrates that Doug Evans and the office he runs have systematically denied African Americans the right to serve as jurors throughout his 25 years in office. APM Reports gathered court records for all 418 trials conducted by Mr. Evans and his office since he was elected District Attorney.[93] For 225 trials, involving 6,763 potential jurors, APM Reports was able to collect race data.[94] The data revealed a marked disparity in the prosecution's use of peremptory challenges. Overall, the State struck 49.81% of prospective African American jurors and 11.21% of white jurors.[95] In other words, Mr. Evans' office struck African American jurors *4.4 times* more frequently than white jurors.

APM Reports attempted to analyze the data in myriad ways to find a geographical area, type of case, or circumstance in which African Americans were not

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[93] Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, at 3, APM Reports, https://www.apmreports.org/files/peremptory_strike_methodology.pdf (last visited Dec. 19, 2018).

[94] *Id.* at 5.

[95] *Id.* at 6.

struck at a significantly higher rate than whites. They failed. African Americans were struck more frequently in every county in the Fifth Judicial District.[96] They were struck more frequently in trials for minor crimes and more frequently in trials for serious crimes.[97] When the defendant was white, Doug Evans' office struck African American jurors more frequently.[98] But, when the defendant was Black, the rate of strikes against Black jurors more than doubled as compared to white defendant cases.[99]

In 89 cases, APM Reports was also able to get full trial transcripts and code jurors' answers to different questions to determine whether their answers suggested a nonracial explanation for this pattern of strikes. It did not. To the contrary, when APM Reports controlled their regression analysis for the answers given, the influence of race increased. Simply being African American increased a jurors' chances of being struck by Doug Evans or his office 6.67 times—a much greater effect than even knowing the defendant or having a family member in law enforcement.[100]

B. Doug Evans' Actions Throughout the Six Curtis Flowers Trials Reveal an Intent to Remove as Many African-American Jurors as Possible.

Both in and outside the courtroom, Doug Evans has worked feverishly to ensure that an all- or

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 10.

predominantly-white jury decides whether African American Curtis Flowers committed a quadruple murder with three white decedents and very weak evidence.[101] In Mr. Flowers' first trial, Doug Evans obtained an all-white jury by using five peremptory challenges on African American jurors.[102] The jury convicted Mr. Flowers after deliberating for 66 minutes.[103] In Mr. Flowers' second trial, Mr. Evans again attempted to strike every African American juror; however, the trial judge determined that one of the strikes was discriminatory and ordered that Mr. Evans keep the juror. The resulting jury had eleven white members and one African American.[104] It, too, convicted Mr. Flowers.

In the third trial, Mr. Evans again attempted to remove every African American from the venire. He used all fifteen of his strikes—twelve peremptory challenges and three alternate challenges—on African Americans, yielding a jury with just one African American. This jury also convicted Mr. Flowers, but the Mississippi Supreme Court recognized that Mr. Evans' strikes reflected "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."[105] It reversed Mr. Flowers' conviction, finding that two of

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[101] *See generally* Pet. for Writ of Cert., *Flowers v. Mississippi*, No. 17-9572 (June 21, 2018).

[102] Clerk's Papers (hereinafter "CP") at 1656.

[103] *In the Dark Season Two: The Trailer* (Apr. 16, 2018), https://www.apmreports.org/story/2018/04/16/in-the-dark-season-two-trailer.

[104] *See* CP at 1662.

[105] *Flowers v. Mississippi*, 947 So. 2d 910, 935–36 (Miss. 2007).

Mr. Evans' strikes were clearly motivated by race and three others were suspicious.[106]

Following consecutive trials in which courts had found that he eliminated African American jurors because of their race, Mr. Evans proceeded to use all eleven of the peremptory challenges he exercised to strike African Americans at Mr. Flowers' fourth trial. This time, however, the panel's racial balance more closely represented the demographics of Montgomery County, and five African American jurors were seated. The five African American jurors voted unanimously to acquit, the seven white jurors all voted to convict, and the judge declared a mistrial.

Nearly the same thing happened in the fifth trial. Mr. Evans used all but one of his strikes on African American jurors, and the jury hung, with an African American juror as the sole hold out.[107] At this point, Mr. Evans had garnered convictions each time he had limited the jury to one African American or fewer, and he had failed to secure convictions when more than one African American juror was seated.

When the fifth trial adjourned, the trial judge detained the sole holdout and harangued him in open court.[108] The judge ordered the bailiffs to arrest the juror, claiming—with no apparent factual basis—that he had lied during voir dire.[109] Mr. Evans then pursued the prosecution of the juror who had

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[106] *Id.* at 936.
[107] CP 1891; *The Trials of Curtis Flowers*, APM Reports (June 5, 2018), https://www.apmreports.org/story/2018/06/05/in-the-dark-s2e7.
[108] *See id.*
[109] *See id.*

thwarted his latest effort to convict Mr. Flowers, resisting calls to recuse himself because of a conflict for the next eight months.[110] Once Mr. Evans finally recused himself, the Mississippi Attorney General's office assumed responsibility for the prosecution and asked the court to dismiss the charges.[111] The juror's attorney explained the effect of the arrest: "It was a completely bogus charge. I believe [the juror] was indicted to send a message to future jurors who vote for acquittal."[112]

Doug Evans also pursued a second path to reducing the odds that African Americans would serve on the sixth trial: in consultation with Judge Loper, Mr. Evans approached two local politicians with ties to the Council of Concerned Citizens—state senator Lydia Chassaniol and state representative Bobby Howell—and asked them to submit legislation that would permit him to try Mr. Flowers' case outside of the racially diverse confines of Montgomery County.[113] Both politicians obliged. Representative Howell introduced House Bill No. 302, which empowered prosecutors to seek a change of venue to a new county "if [they] cannot have a fair and impartial

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[110] *See id.*

[111] *See id.*

[112] Lacey McLaughlin, *Majority White Jury in Flowers Trial*, Jackson Free Press (June 11, 2010), http://www.jacksonfreepress.com/news/2010/jun/11/majority-white-jury-in-flowers-trial/.

[113] Monica Land, *Sixth trial set in Winona murders*, Grenada Star (Sept. 22, 2009), https://www.grenadastar.com/2009/09/22/sixth-trial-set-in-winona-murders/.

trial in the county" where the crime was charged.[114] Senator Chassaniol introduced Senate Bill 2069, which would permit the prosecution to seek a jury "from the entire circuit court district" if three specific conditions were met: a previous trial, a previous mistrial, and an unsuccessful attempt by the court to seat an impartial jury.[115] Because five of the six remaining counties in the Fifth Judicial District have a higher population of white residents than Montgomery County, the effect of both bills would be the reduction of African Americans in the jury pool for any future trial.[116]

Although neither bill was enacted by the legislature, Doug Evans still obtained another predominantly-white jury in the sixth Curtis Flowers trial. In this iteration, Mr. Evans accepted the first African American juror presented and struck the remaining five.[117] Thus, Mr. Evans ended up with eleven white jurors out of a venire that had been 42% African American before peremptory and for-cause challenges were issued.[118] This predominantly-white

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[114] H.B. 302, Reg. Sess. 2009 (Miss. 2009), http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0300-0399/HB0302IN.pdf. Under current Mississippi law, only defendants may request change in venue. *See* Miss. Code Ann. § 99-15-35.

[115] Comm. for S.B. 2069, Reg. Sess. 2009 (Miss. 2009), http://billstatus.ls.state.ms.us/documents/2009/pdf/SB/2001-2099/SB2069PS.pdf.

[116] *Mississippi White Population Percentage, by County* (2013), https://www.indexmundi.com/facts/united-states/quick-facts/mississippi/white-population-percentage#map.

[117] *Flowers v. Mississippi*, 158 So. 3d 1009, 1046 (Miss. 2014).

[118] *Id.* at 1089 (King, J., dissenting).

jury convicted Mr. Flowers of the four homicides in 29 minutes.[119]

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[119] Dave Mann, *Did jury makeup decide Curtis Flowers' fate and send him to death row?*, Clarion Ledger (June 24, 2018), https://www.clarionledger.com/story/news/2018/06/24/race-jurors-predicted-outcome-curtis-flowers-trial-analysis/726802002/.

CONCLUSION

One hundred and forty three years after the enactment of the Civil Rights Act of 1875, prosecutors continue to deny African Americans the right to serve on juries—particularly in Mississippi's Fifth Judicial District. This Court should reaffirm its commitment to the eradication of jury discrimination and require that lower courts give serious scrutiny to all indicia of discrimination—history, statistics, and implausible justifications, among others. Unless this Court requires a more searching *Batson* inquiry than that employed by the lower courts in this case, African Americans will continue to be unequal citizens in this country.

Petitioner's conviction and death sentence should be reversed.

Respectfully submitted,

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December 27, 2018